No. 88-1845

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW JERSEY CHAMBER OF COMMERCE; CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY; NEW JERSEY BUSINESS AND INDUSTRY ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.; MERCK & CO., INC.; MAGNESIUM ELEKTRON, INC.; C.P. CHEMICALS, INC.; EXXON CHEMICAL AMERICAS, a division of EXXON CORPORATION; SCHERING CORPORATION; ESSEX CHEMICAL CORPORATION; INGERSOLL-RAND COMPANY; AND SHELL CHEMICAL COMPANY, a division of SHELL OIL COMPANY, *Petitioners*,

v.

ROBERT E. HUGHEY, Commissioner of Environmental Protection; J. RICHARD GOLDSTEIN, M.D., Commissioner of Health and WILLIAM VAN NOTE, Acting Commissioner of Labor and THE STATE OF NEW JERSEY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

A. The Express Preemption Principles Set Forth by This Court in *Pacific Gas* Require Inquiry Into the Purposes of State Law Only When the Express Terms of the Controlling Federal Enactment Define the Scope of Preemption in Terms of the Purposes of State Law 2

B. The Occupational Safety and Health Administration Maintains That the Avowed Purposes of State Law Do Not Insulate Them From Preemption by the 1983 or the Revised Standards 4

C. Section 14 of the New Jersey Act Does Not Evade Preemption Merely Because the Revised Standard Permits Chemical Names and CAS Numbers to Appear on Labels 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases Cited: Page

City of New York v. Federal Communications Commission, 108 S.Ct. 1637 (1988) 6, 7
Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982) 6, 7, 8
New Jersey State Chamber of Commerce v. State of New Jersey, 653 F.Supp. 1453 (D.N.J. 1987) .. 8
New Jersey State Chamber of Commerce v. Hughey, 868 F.2d 621 (3d Cir. 1989) ..... *passim*
New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985) ..... *passim*
Pacific Gas & Electric Co. v. State Energy Res. Conserv. & Dev't Comm'n, 461 U.S. 190 (1983) .. 2, 3, 4
Perez v. Campbell, 402 U.S. 637 (1971) 6
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 3

Federal Statutes Cited:

29 U.S.C. Section 655 2
29 U.S.C. Section 667 4
29 U.S.C. Section 667(a) ..... *passim*
29 U.S.C. Section 667(c)(2) 8, 9
29 U.S.C. Section 667(f) 9
42 U.S.C. Section 2021(k) 3

Federal Regulations & Rules Cited:

Sup. Ct. R. 22.5 2
29 C.F.R. Section 1901.2 4
29 C.F.R. Section 1910.1200(a)(2) 3, 4, 5
47 Fed. Reg. 12103 (Mar. 29, 1982) 8
47 Fed. Reg. 12111 (Mar. 29, 1982) 8
47 Fed. Reg. 12112 (Mar. 29, 1982) 8
48 Fed. Reg. 53284 (Nov. 25, 1983) 4
48 Fed. Reg. 53291 (Nov. 25, 1983) 8
48 Fed. Reg. 53292 (Nov. 25, 1983) 8
48 Fed. Reg. 53293 (Nov. 25, 1983) 8
48 Fed. Reg. 53301 (Nov. 25, 1983) 8
48 Fed. Reg. 53302 (Nov. 25, 1983) 8
48 Fed. Reg. 53303 (Nov. 25, 1983) 8

TABLE OF AUTHORITIES—Continued

	Page
48 Fed. Reg. 53305 (Nov. 25, 1983)	8
48 Fed. Reg. 53326 (Nov. 25, 1983)	8
48 Fed. Reg. 53327 (Nov. 25, 1983)	8
52 Fed. Reg. 31857 (Aug. 24, 1987)	5
52 Fed. Reg. 31858 (Aug. 24, 1987)	5
52 Fed. Reg. 31860 (Aug. 24, 1987)	5, 9
52 Fed. Reg. 31864 (Aug. 24, 1987)	8
52 Fed. Reg. 31877 (Aug. 24, 1987)	4
State Statutes Cited:	
N.J.S.A. 34:5A-14	*passim*
Other Regulations Cited:	
N.J.A.C. 8:59-5.1, et seq.	6
Other Sources Cited:	
S.2788, 91st Cong., 1st Sess. Section 14(b) (1969), *reprinted in, Legislative History of the Occupational Safety and Health Act of 1970*, 58 (Comm. Print 1971)	7
H.R. 13373, 91st Cong., 1st Sess. Section 14(b) (1969), *reprinted in, Legislative History of the Occupational Safety and Health Act of 1970*, 706 (Comm. Print 1971)	7
Brief for Secretary of Labor, *United States Steelworkers of America v. Auchter*, 763 F.2d 728 (3rd Cir. 1983)	6
Brief for United States, *Manufacturer's Ass'n of Tri-County v. Knepper* (U.S. filed Sept., 1987) (No. 86-1102)	5, 6
U.S. Dept. of Commerce, *Hazard Communication Standard Interpretations, Indexes and Letters*, Record No. 2592, pp. 326-329 (June 1986)	9

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v.

ROBERT E. HUGHEY, Commissioner of Environmental Protection; J. RICHARD GOLDSTEIN, M.D., Commissioner of Health and WILLIAM VAN NOTE, Acting Commissioner of Labor and THE STATE OF NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

Respondents acknowledge that the scope of presumption is delineated by the express terms of OSH Act Section 18 and the Revised Standard. (Resp. Br. 7-9). They concede that this express presumption extends to all state regulation of occupational safety and health issues addressed by an OSH Act Section 6 standard. (Resp. Br.

8). Respondents further concede that the Revised Standard is an OSH Act Section 6 standard which addresses the occupational safety and health issue of evaluating the potential hazards of chemicals and communicating them to employees through labeling of chemical containers in the workplace. (Resp. Br. 9). Since they fail to dispute that their in-plant labeling requirement addresses precisely the same issue, they effectively concede that New Jersey Act Section 14 falls within the scope of express preemption.

Seeking to evade the express preemptive effect of OSH Act Section 18 and the Revised Standard, Respondents argue that (1) the Third Circuit's inquiry into the avowed purpose of the New Jersey Act is compelled by this Court's decision in *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev't Comm'n*, 461 U.S. 190 (1983) (Resp. Br. 12-15); (2) the Third Circuit's "primary purpose" test has been adopted by the Occupational Safety and Health Administration ("OSHA") (Resp. Br. 18-22); and (3) the New Jersey Act is not expressly preempted because the Revised Standard permits chemical names and Chemical Abstract Service ("CAS") numbers to appear on container labels (Resp. Br. 22-24). Petitioners respectfully submit this reply brief pursuant to Rule 22.5 to address these arguments first raised by Respondents in their Brief in Opposition.

A. The Express Preemption Principles Set Forth by This Court in *Pacific Gas* Require Inquiry Into the Purposes of State Law Only When the Express Terms of the Controlling Federal Enactment Define the Scope of Preemption in Terms of the Purposes of State Law.

Respondents contend that the Third Circuit's "primary purpose" analysis is compelled by this Court's earlier decision in *Pacific Gas*, 461 U.S. at 212-13. Significantly, the court below neither cited nor discussed *Pacific Gas* in either *Hughey I* or *Hughey II*. *See* App. 84a-107a, 1a-24a. Unlike the court below, this Court in *Pacific*

Gas focused exclusively upon express terms of the controlling federal enactment in determining the scope of express preemption. More specifically, in *Pacific Gas* this Court interpreted the Atomic Energy Act which expressly permitted states to regulate for "purposes other than protection against radiation hazards." *Id.* at 210, *quoting*, 42 U.S.C. Section 2021(k). Thus, inquiry into the purposes of the state enactment was made relevant by the express terms of the federal statute. Whenever the state does regulate for purposes forbidden by the Atomic Energy Act, this Court observed that the state may not evade preemption merely by articulating an additional non-preempted purpose for their regulation:

> [a]t the outset, we emphasize that the [California] statute does not seek to regulate the construction or operation of a nuclear power plant. It would clearly be impermissible for California to attempt to so, for such regulation, *even if enacted out of non-safety concerns*, would nevertheless directly conflict with NRCs' exclusive authority over plant construction and operation . . . . State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except with the limited powers expressly ceded to states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

Id. at 212-13 (emphasis added), *quoting*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

Unlike the federal statute interpreted by this Court in *Pacific Gas*, neither Section 18 of the OSH Act nor Section 1200(a)(2) of the Revised Standard define the scope of federal preemption in terms of the purposes of state law. To the contrary, they both define the scope of preemption in terms of the *issue* addressed by the Re-

vised Standard. *See* 29 U.S.C. Section 667; App. 168a-172a; 29 C.F.R. Section 1910.1200(a)(2); App. 592a. Focusing on this issue, OSHA interprets OSH Act Section 18(a) "as preventing any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which a federal Standard has been issued under Section 6 of this Act." 29 C.F.R. Section 1901.2 (emphasis added).

In promulgating the Standard, OSHA recognized the existence of various state and municipal Right to Know laws with differing labeling requirements serving different purposes. *See* 48 Fed. Reg. 53284 (Nov. 25, 1983); App. 236a. Despite this recognition, OSHA phrased the Revised Standard's express preemption provision in terms of issues and expressly defined this issue to include provisions for "labeling of containers of chemicals in the workplace. . . ." *See* 52 Fed. Reg. 31877 (Aug. 24, 1987); App. 592a. Since Section 14 of the New Jersey Act undisputedly addresses this issue, this Court's preemption analysis as set forth in *Pacific Gas* establishes that the avowed non-occupational purposes of New Jersey Act Section 14 do not insulate it from express preemption. Respondents' emphasis upon these allegedly non-occupational purposes is merely an effort to divert this Court's attention from the only relevant inquiry—the scope of preemptive intent as reflected in the controlling federal enactments.

B. The Occupational Safety and Health Administration Maintains That the Avowed Purposes of State Law Do Not Insulate Them From Preemption by the 1983 or the Revised Standards.

Respondents do not dispute that OSHA rejected the Third Circuit's "primary purpose" analysis in the Amicus Curiae brief submitted to this Court in *Knepper* (Resp. Br. 20). They contend, however, that OSHA no longer adheres to this position because: (1) OSHA interpreted the 1983 Standard rather than the Revised Standard in

Knepper; and (2) the Amicus Curiae brief in *Knepper* was filed *before* the Revised Standard was promulgated. Even a cursory review of the Amicus Curiae brief refutes both of these factual contentions. *See* Brief for United States, *Manufacturers Ass'n of Tri-County v. Knepper*, (U.S. filed Sept., 1987) (No. 86-1102). At this Court's request, the Solicitor General filed his *Knepper* brief in September of 1987, one month *after* the Revised Standard was promulgated in August of 1987. Moreover, the Revised Standard's expanded preemptive scope was discussed in the *Knepper* brief. *Id.* at 15. Thus, OSHA's rejection of the "primary purpose" test in *Knepper* is OSHA's most recent and controlling position on this issue.

Respondents emphasize OSHA's references to the primary purpose of state laws in the Revised Standard's preamble. However, they ignore those portions of the preamble wherein OSHA determined that, due to the continued existence of numerous state and local hazard communication right-to-know laws, a uniform Federal hazard communication standard is the best method to ensure that all employees receive information regarding the chemical hazards to which they are exposed. *See* 52 Fed. Reg. 31857-58 (Aug. 24, 1987); App. 524a-527a. Moreover, OSHA emphasized that this uniform Federal standard would preempt these different and potentially conflicting state and local laws, *id.* at 31857; App. 524a, regardless of whether they complement, supplement or conflict with the Revised Standard. *Id.* at 31860; App. 536a.

More fundamentally, in the express terms of the Revised Standard itself, OSHA delineates the scope of express preemption in terms of the issues addressed by that Federal standard and expressly defines those issues to include the labeling of chemical containers in the workplace. 29 C.F.R. Section 1910.1200(a)(2) (1987); App. 592a. While the preamble to the Revised Standard is an interpretative aid, the express terms of the Revised Standard have the same preemptive effect as a federal

statute and are therefore controlling to the extent of any perceived inconsistency with the preamble. *See City of New York v. Federal Communications Commission*, 108 S.Ct. 1637, 1642 (1988); *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 152 (1982).

To support their contention that state or local provisions which purportedly address non-occupational concerns are not expressly preempted by the Revised Standard, Respondents rely upon a portion of the Secretary of Labor's brief filed in the *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3rd. Cir. 1983). (Resp. Br. 21-22). Respondents emphasize Secretary of Labor's statement that "[i]nsofar as activities involve the health or safety of the *general public*, there is no Federal regulatory [including preemptive] authority under OSHA. . . ." (Resp. Br. 22, *quoting*, Brief for Secretary of Labor at 88 (emphasis original)). Respondents do not continue this quote to include the next sentence which provides "[h]owever, to the extent that there are severable portions of a "community 'right to know'" law that are workplace or employee-specific, they are not immune from preemption by OSHA simply because they are enveloped in a law that at the same time manifests a broader purpose." (Brief for Secretary of Labor at 88-89 & n.88, *citing with approval*, *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971)).

In our petition to this Court, Petitioners demonstrated that Section 14 of the New Jersey Act is clearly both workplace and employee-specific. (Petition, 16-17). Both the language of New Jersey Act Section 14 and its implementing regulations demonstrates that the only effect of this in-plant labeling scheme originates and terminates within the employer's workplace. *Id. See* N.J.S.A. 34:5A-14; App. 191a-193a; N.J.A.C. 8:59-5.1, *et seq.*; App. 635a-642a. Thus, the express preemption of the State provision is entirely consistent with OSHA's position taken in both *Knepper* and *Auchter*.

C. Section 14 of the New Jersey Act Does Not Evade Preemption Merely Because the Revised Standard Permits Chemical Names and CAS Numbers to Appear on Labels.

Respondents argue that Section 14 is not expressly preempted by the Revised Standard because the former requires labels to contain chemical names and CAS numbers while the latter permits, but neither requires nor prohibits, labels to contain such information. (Resp. Br. 22-24). Departing from the controlling principles of express preemption, *see supra*, Respondents erroneously apply "actual conflict" principles of implied preemption under which New Jersey Act Section 14 would be invalid only if compliance with both state and federal labeling schemes would be a "physical impossibility." *See City of New York*, 108 S.Ct. at 1643; *De la Cuesta*, 458 U.S. at 153.

Respondents ignore that in phrasing the express preemptive language of Section 18(a) in terms of an "issue", Congress expressly rejected proposals limiting the statute's preemptive scope to state laws "in conflict" with an OSHA standard or to those not affording "significantly greater protection" than an OSHA standard. *See* S.2788, 91st Cong., 1st Sess. Section 14(b) (1969); H.R. 13373, 91st Cong. 1st Sess., 14(b) (1969), *reprinted in, Legislative History of the Occupational Safety and Health Act of 1970*, at 58, 706 (Comm. Print 1971). More recently, OSHA explained that:

> "[t]he express preemption provisions of the [OSH] Act apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law would conflict with, complement, or supplement the Federal standard, and without regard to whether the state law appears to be 'at least as effective as' the Federal standard. The 'at least as effective as' test applies only to state standards adopted under an approved State plan."

52 Fed. Reg. 31860 (Aug. 24, 1987), *citing*, 29 U.S.C. Section 667 (c)(2); App. 536a. Thus, whenever a state law, such as New Jersey Act Section 14, relates to an issue addressed in a Federal standard, such as the Revised Standard, OSH Act Section 18 mandates that any inquiry into whether the state law conflicts with the Federal Standard shall be made by OSHA, rather than by the courts. *Id.*

In promulgating the Revised Standard, OSHA rejected proposals requiring employers to place chemical names and CAS numbers on labels. *See* 48 Fed. Reg. 53293, 53301-03, 53326-27 (Nov. 25, 1983); App. 274a, 305a-317a, 414a-418a; 47 Fed. Reg. 12103 (March 29, 1982); App. 211a-212a. By requiring employers to utilize its format for chemical identification (i.e., chemical names and CAS numbers) which was specifically rejected by OSHA, New Jersey impermissibly withdraws from employers the flexibility which OSHA intended to accord them. *Id. Accord De la Cuesta*, 458 U.S. at 155. Similarly, OSHA affirmatively rejected other proposals which Respondents seek to enforce through New Jersey Act Section 14, including those requiring employers to place labels on pipelines and to comply with extensive labeling for nonhazardous substances and mixture ingredients. *See* 52 Fed. Reg. 31864 (Aug. 24, 1987); App. 550a-553a; 48 Fed. Reg. 53291-92, 53301-03, 53305, 53326-27 (Nov. 25, 1983); App. 262a, 271a, 305a-316a, 326a, 414a-418a; 47 Fed. Reg. 12103, 12111-12 (March 29, 1982); App. 211a-216a. OSHA's rejection of proposals for substantive requirements in promulgating a standard establishes that state enactments containing the same substantive provisions fall within the scope of express preemption. *See New Jersey Chamber of Commerce v. State of New Jersey*, 653 F.Supp. 1453, 1468 (D.N.J. 1987). Accordingly, requirement that chemical names and CAS numbers appear on container labels as set forth in Section 14 of the New Jersey Act is clearly within the scope of express preemption set forth in Section 18 of the OSH Act and in the Revised Standard.

Under the OSH Act Section 18 state plan review procedure, it is for OSHA to determine whether New Jersey's in-plant labeling scheme conflicts with the Revised Standard's integrated hazard communication program. *See* 29 U.S.C. Section 667(c)(2); App. 169a; 52 Fed. Reg. 31860 (Aug. 24, 1987); App. 536a. Respondents' refusal to submit the New Jersey Act for state plan review is understandable in view of OSHA's prior "informal" rejection of New Jersey Act Section 14 as not satisfying the "at least as effective" requirement of OSH Act Section 18(c). *See* U.S. Dept. of Commerce, *Hazard Communication Standard Interpretations, Indexes, and Letters*, Record No. 2592, 326-329 (June 1986); App. 664a-648a. Hence, the court below effectively permitted New Jersey to usurp OSHA's Congressionally delegated authority without affording this administrative agency with an opportunity to be heard. *Cf.* 29 U.S.C. Section 667(f); App. 168a. This usurpation squarely presents an important question of federal law which this Court may resolve through a disposition of this case on the merits.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issued to review the judgment in the opinion of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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